No. 87-6796

In The

Supreme Court of the United States

October Term, 1990

JAMES A. FORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

Where Petitioner never objected at trial to the prosecutor's actual use of peremptory strikes or to the actual jury composition, is the decision of the Georgia Supreme Court, finding the *Batson* issue was not preserved for review, consistent with *Griffith v. Kentucky*?

II.

Does the procedural bar as applied by the Georgia Supreme Court in this case, resting upon Petitioner's lack of trial objection, constitute an independent and adequate state ground?

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PART ONE

STATEMENT OF THE CASE

Petitioner, James A. Ford, was indicted by the Coweta County, Georgia, grand jury on September 5, 1984, for the February 29, 1984, malice murder of Sara Dean (count 1); the rape of Sara Dean (count 2); the kidnapping of Sara Dean (count 3); the armed robbery of Sara Dean (count 4); and the burglary of the J & L Oil Company (count 5). (Record 4-6). On September 7, 1984, the state gave written notice of its intent to seek the death penalty and the underlying statutory aggravating circumstances

which the state would seek to prove. (Record 13-14). Accordingly, the case was tried under Georgia's Unified Appeal Procedure, with pretrial hearings being held on September 7 and 21, 1984, and October 12, 1984.

On October 9, 1984, counsel for Petitioner, Arthur B. Edge, IV, filed a "motion to restrict racial use of peremptory challenges." (Record 49; JA 3-4). In this pretrial motion Petitioner alleged that the prosecutor "has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race." *Id.* Petitioner further "*anticipated* that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes." *Id.* (Emphasis added). Petitioner requested a pretrial order prohibiting the prosecutor from using challenges "in a racially biased manner." *Id.*

The pretrial motion was argued at the October 12, 1984, motions hearing wherein Petitioner orally requested that the prosecutor be required to "justify on the record the reason" for the prosecutor striking black potential jurors. (10/12/84 Motions Transcript 160-61; JA 10) (hereinafter M.T.). The trial court denied the motion. *Id.*

At the jury trial on October 22-25, 1984, Petitioner never reasserted the motion to restrict the prosecutor's use of strikes. The motion was not raised by Petitioner prior to, during or after voir dire. (Trial Transcript 3-160) (Hereinafter referred to as "T"). The actual striking of the jury is not recorded. (T. 166; JA 12-13). The jury was selected and sworn, then sequestered while additional bailiffs were sworn. Afterwards, the jury was brought in

and advised they would be sequestered for the trial which would begin the following day. (T. 166-67; JA 13-14). The trial court asked counsel for Petitioner if there were anything the court needed to address, and counsel replied no. (T. 170; JA 14). Counsel for Petitioner stated that he would be ready to try the case in the morning. *Id.* Court was recessed for the day. *Id.*

On the second day of trial, October 23, 1984, both sides gave opening statements, and the state presented eight witnesses prior to the noon recess. (T. 171; 175; 202; 206; 215; 219; 221; 227; 233; 244; 250; 268). Prior to beginning the afternoon session, in a recorded conference in chambers, the trial court placed two matters on the record. (T. 268; JA 15). The trial court ascertained the views of the parties on permitting jurors to vote in a local election that day. (T. 268-70). Secondly, the trial judge stated the following:

> One other matter we need to take up. One of Mr. Edge's motions was to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used, it did not strike all the blacks. There's a black on the jury.

(T. 270; JA 15). Counsel for Petitioner then noted for the record that according to his count, the state had used nine of its ten peremptory challenges on black veniremen. *Id.* The trial court agreed and noted that the one black venireman which the prosecutor did not strike was serving on the jury and that the potential black alternate juror which the state did not strike was struck by Petitioner. (T. 270-71; JA 15). The trial judge summarized the following:

> That's what happened in the jury selection process. I just think that needs to be put in since that motion was made. Of course, the motion has been denied. It doesn't matter now but I think just for the record's sake that ought to be done. You all can go in and set up and we'll be ready to go shortly.

(T. 271; JA 15-16).

At that point the prosecutor asked if it would "be appropriate" for the state to make any showing of the reasons for the strikes used. *Id.* The trial court replied, "I'm not asking for it." *Id.* The trial resumed with Petitioner never making any objection to the jury actually selected. *Id.*

Upon the conclusion of the guilt/innocence phase, the jury returned a verdict of guilty on all five counts on October 24, 1984. (Record 86). The following day, after completion of the sentencing proceeding, the jury found the existence of four statutory aggravating circumstances and returned a binding recommendation that Petitioner be sentenced to death for murder. (Record 97). On that same date the trial court sentenced Petitioner to death for the malice murder, to a consecutive life sentence for the rape, to a consecutive life sentence for the kidnapping, and to a consecutive life sentence for the armed robbery, and to a consecutive sentence of twenty years imprisonment for burglary. (Record 100-101).

On November 26, 1984, new counsel entered the case on Petitioner's behalf. Attorney Nelson Jarnagin filed an entry of appearance on that date and filed a motion for new trial raising only the general grounds. (Record 102, 105; JA 5). The motion of trial counsel Edge to withdraw

was granted by the trial court on November 27, 1984. (Record 107-109).

On January 7, 1985, new counsel for Petitioner filed an amendment to the motion for new trial raising, among other issues, a claim that Petitioner's "right to an impartial jury as guaranteed by (sic) Sixth Amendment to the United States Constitution was violated by the prosecutor's exercise of his peremptory challenges on a racial basis" and that Petitioner received ineffective assistance of counsel at trial. (R. 111-12; JA 7-8). The hearing on the motion for new trial was held on January 18, 1985, where trial counsel was called as a witness and testified on the ineffectiveness issue. (Motion for New Trial 1; 49-57) (hereinafter MNT).

At the motion for new trial hearing, new counsel for Petitioner asserted that trial counsel had allegedly reasserted the motion to restrict the prosecutor's use of strikes at page 161-62 of the trial transcript. (MNT 31; JA 17). However, this is an error as this colloquy concerned the motion for change of venue which the trial court denied. (T. 162). New counsel for Petitioner also claimed at the motion for new trial hearing that trial counsel had reasserted the objection at pages 270-71 of the trial transcript. (MNT 32; JA 17). However, this is a reference to the colloquy which occurred after lunch recess on the second day of trial. New counsel for Petitioner asserted that that Second Circuit opinion in *McCray v. Abrams*[1] on December 4, 1984, constituted a change in the previous standard of *Swain v. Alabama*, 380 U.S. 202 (1965), regarding the prosecutor's use of strikes. (MNT 34; JA 19). Trial

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[1] *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984)

counsel was never questioned by new post-trial counsel regarding the prosecutor's use of strikes nor trial counsel's satisfaction or dissatisfaction with the trial jury actually selected. (MNT 49-57). The trail court ultimately denied the amended motion for new trial on February 19, 1985. (Record 244; JA 9).

On October 29, 1985, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences. *Ford v. State*, 255 Ga. 81, 355 S.E.2d 567 (1985) (JA 22). The appellate court specifically found that Petitioner had failed to establish systematic exclusion of black jurors. *Ford*, 255 Ga. at 83(1) (JA 25).

In his first petition for a writ of certiorari, Petitioner prayed that this Court hold this case pending decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). On February 23, 1987, this Court granted certiorari, vacated judgment and remanded this case to the Georgia Supreme Court for further consideration in light of *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987). (JA 49).

In an opinion dated November 30, 1987, the Supreme Court of Georgia found that Petitioner had failed to make any objection to the prosecutor's use of peremptory challenges regarding the jury actually selected at trial so that the *Batson* claim was not preserved for review on the merits. *Ford v. State*, 257 Ga. 661, 362 S.E.2d 764 (1987). (JA 50).

Petitioner thereafter filed the underlying petition for a writ of certiorari to this Court raising three questions: (1) whether the Georgia Supreme Court could avoid compliance with the remand by declaring that a pre-*Batson* challenge was a different constitutional claim than *Swain*;

(2) whether retroactive application of *Batson* could be avoided by envoking an allegedly previously-unannounced procedural bar; and (3) whether the Sixth Amendment fair cross-section requirement barred the prosecutor's alleged racial use of peremptory challenges. On April 23, 1990, this Court granted certiorari as to questions one and two and specifically declined to grant certiorari on question three. (JA 59). This brief on the merits on behalf of the State follows.

SUMMARY OF THE ARGUMENT

The critical issue for resolution in this case is whether a defendant, who made a pretrial motion "anticipating" that the prosecutor might use his strikes in a racially discriminatory manner but who does not renew that motion after the prosecutor has exercised his peremptory challenges or otherwise voice any objection at any point during trial to the jury as selected, is entitled to litigate on the merits a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Georgia Supreme Court properly found that under the facts of this case, Petitioner failed to preserve the *Batson* issue for review due to the lack of any objection by Petitioner at trial to the prosecutor's actual use of strikes. The State submits that this decision of the Supreme Court of Georgia is not inconsistent with nor violative of the remand order in this case as *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987), and *Brown v. United States* both involved criminal defendants who at trial, after the prosecutors used their allotted peremptory challenges, specifically objected to the manner in which the strikes were used.

The State further submits that a *Batson* claim inherently does not arise until after the prosecutor has exercised his or her peremptory challenges at the particular defendant's trial. Particularly here, where Petitioner admittedly did nothing more than "anticipate" that the prosecutor might utilize his peremptory challenges in an allegedly discriminatory manner, it was incumbent upon Petitioner to object in some fashion to the jury *actually selected after* the prosecutor had in fact utilized his strikes. The State submits that the decision of the Supreme Court of Georgia, in declining to excuse Petitioner from this critical failure to object, is not unreasonable.

The State further submits that the procedural bar relied upon by the Supreme Court of Georgia in this case constitutes an independent and adequate state ground. An appropriate objection to the jury actually selected following the prosecutor's use of peremptory challenges enables the trial court to take remedial action.

The essence of Petitioner's complaint is the application of any procedural bar to his case. The State submits, however, that *Batson* is not so novel that prior to its pronouncement Petitioner possessed no legal basis for objecting to the prosecutor's actual use of strikes at trial after the exercise of those strikes.

Contrary to Petitioner's representations, the state appellate court did not rely upon the procedural bar solely in an effort to avoid deciding a federal question; rather, the state appellate court had previously decided the issues of timeliness and the method by which a *Batson* challenge must be preserved so that those principles were merely applied in this case without readjudication. The

major premise of the decision of the Supreme Court of Georgia on remand is Petitioner's lack of trial objection to the jury actually selected. Under these facts, the State submits that there is no federal constitutional question for decision by this Court.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF GEORGIA, IN FINDING THE *BATSON* ISSUE WAS NOT PRESERVED FOR REVIEW DUE TO THE LACK OF ANY TRIAL OBJECTION, IS NOT INCONSISTENT WITH *GRIFFITH* OR *BATSON*.

Petitioner initially contends that the Supreme Court of Georgia "apparently acted on the mistaken notion" that a challenge to the prosecutor's use of peremptory strikes under *Swain* is different from *Batson*. Petitioner contends that *Griffith* "makes clear" that no such distinction exists. Petitioner asserts that *Griffith* held that all pending *Swain* claims in all cases not yet "final" should, as a matter of law, be treated automatically as *Batson* claims, without any inquiry into the underlying facts of each case. The State submits that Petitioner overstates this Court's holding in *Griffith* and that the broad question of whether *Swain* claims are, as a matter of law, the equivalent of *Batson* claims has not previously been decided. This broad question need not be reached, however, due to the presence of an underlying factual issue which is dispositive of this case. The State submits that the more narrow question for resolution in this case is whether a *Swain* claim is, as a matter of fact, the legal equivalent of a *Batson* claim where, as here, Petitioner

never made an objection to the prosecutor's actual use of strikes at Petitioner's own trial nor to the actual jury empaneled to try his case. The dispositive nature of this factual distinction is apparent from a review of *Batson* and its progeny.

In *Batson* itself, "Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws." *Batson*, 476 U.S. at 83. Batson's request for a hearing on his motion was denied by the trial court. *Id.* On review this Court noted that since *Swain*, the Court "had recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.*" *Batson*, 476 U.S. at 95. (Emphasis in original). This Court then set forth the components of a prima facie case which must be established by a defendant before the prosecutor is required to give race-neutral reasons for the exercise of his peremptory strikes. *Id.* at 96-97. This Court noted:

> We decline, however, to formulate particular procedures to be followed upon a defendant's *timely objection* to a prosecutor's challenges.

Batson, 476 U.S. at 99. (Emphasis added). In a footnote, this Court stated that it would "make no attempt to instruct" the state and federal trial courts on how to implement *Batson* because of the varied jury selection practices. *Id.*

Subsequent cases addressing *Batson's* applicability have involved either a contemporaneous objection at trial by the defendant to the prosecutor's use of strikes or a determination that no claim had been previously raised under *Swain*.

Specifically, in *Allen v. Hardy*, 478 U.S. 254 (1986), wherein this Court held *Batson* would not apply retroactively to cases on collateral review, even that defendant, apparently during jury selection and after the prosecutor had exercised nine of his seventeen strikes in a specific manner, "moved to discharge the jury" on the basis that the prosecutor's use of strikes had denied the defendant his right to be tried by an impartial jury drawn from a fair cross section of the community.

In *Griffith* counsel for the defendant, following the prosecutor's use of strikes, "expressed concern that Griffith was to be tried by an all-white jury . . . [and] asked the court to request the prosecutor to state his reasons for exercising peremptory challenges against the four prospective black jurors." *Griffith*, 107 S.Ct. at 710. Defense counsel thereafter moved to discharge the panel on the basis that the prosecutor's use of strikes violated the defendant's Sixth and Fourteenth Amendment rights. *Id.* Similarly, in the companion case to *Griffith*, *Brown v. United States*, after the prosecutor had used two strikes upon two black veniremen, the defendant "objected to the prosecutor's use of peremptory challenges to strike the black persons from the jury. . . . " Thus, in the two decisions in which this Court announced the rule that *Batson* would apply retroactively "to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a

'clear break' with the past," *Griffith*, 107 S.Ct. at 716, each defendant expressly objected to the prosecutor's use of strikes after those strikes had been utilized.

Finally, in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 1066 (1989), this Court noted that *Batson* "overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause." This Court made no reference to whether Teague had made a timely objection to the prosecutor's use of strikes, as had been specifically noted in *Batson*. This Court did note, however, that Teague's challenge to the prosecutor's use of strikes under *Swain* was procedurally defaulted under Illinois law as he had not raised that claim at trial or on direct appeal. 109 S.Ct. at 1067-1068.

The instant case presents a factual scenario significantly different from the above-cited cases. In this case, Petitioner raised a challenge prior to trial to the prosecutor's use of peremptory strikes, with Petitioner specifically "anticipating" that the prosecutor might utilize those strikes in a racially discriminatory manner at trial. However, the record contains no objection voiced by Petitioner at any time prior to, during or after voir dire or at any time prior to, during or after jury selection or at any later point in the trial, to the prosecutor's actual use of his strikes. In fact, the State strongly disagrees with Petitioner's assertion that he made objection during jury selection. As will be discussed more substantively below, Georgia law requires that any such objection, if made, shall be transcribed and made a part of the record. No such objection appears in the record. Further, the Supreme Court of Georgia specifically found as a matter

of fact that no objection was made by Petitioner to the jury actually selected.

By way of background, a Georgia criminal defendant on trial for a capital offense is given twenty peremptory challenges while the prosecutor is given only one-half that number, ten. O.C.G.A. § 15-12-165. If a potential juror is subsequently qualified and is not struck by the state, the juror is placed upon the accused and unless struck by the accused "shall be sworn to try the case." O.C.G.A. § 15-12-166. Any objection to a juror for cause "shall be made before the juror is sworn in the case." O.C.G.A. § 15-12-167. "Theoretically, the parties could seat a jury of twelve without any strikes being exercised, but, nevertheless, a panel of at least forty-two qualified jurors must be offered for consideration." *Aldridge v. State*, 258 Ga. 75, 78, 365 S.E.2d 111 (1988). Two alternates are then selected with the defendant having four strikes and the state two. O.C.G.A. § 15-12-169; *Aldridge v. State*.

Georgia law further provides that "all motions, colloquies, objections, rulings, evidence (whether admitted or stricken on objection or otherwise), copies or summaries of all documentary evidence, the charge of the court, and all other other proceedings which may be called in question on appeal or other posttrial procedure shall be reported. . . . " O.C.G.A. § 5-6-41(d). Any objections or motions during voir dire and subsequent rulings must be and are reported under this code section as they may be matters which may be raised on appeal. *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980).

The actual striking of the jury in this case is not recorded, but Petitioner now asserts he renewed his pre-

trial motion during jury selection. The record contradicts this assertion, and the Supreme Court of Georgia found as fact the absence of any such objection in this case. *Ford*, 257 Ga. at 663. (JA 54). Petitioner asks this Court to assume that he must have made such an objection in light of the subject of the recorded conference in chambers on the second day of the trial in which the trial court placed the racial composition of the jury empaneled in this case on the record. (T. 270-71; JA 15-16). The record does not show that this matter was placed on the record at Petitioner's insistence nor has Petitioner's trial counsel, nor anyone else, ever testified that it was. The State submits that Petitioner's lack of objection to the jury actually selected is pivotal to this Court's resolution of the issues presented in this case.

Petitioner also contends before this Court that he somehow complied with Georgia law regarding contemporaneous objections. The State submits, however, that Petitioner's assessment of Georgia law is not entirely accurate, especially when Petitioner cavalierly interweaves civil cases which are not applicable in a criminal setting and sets forth a three pronged test for preservation of issues which has never been adopted by a Georgia reviewing court. The State further submits that a review of Georgia law on raising and preserving issues is beneficial in determining whether the Georgia Supreme Court was reasonable in requiring Petitioner to have voiced some objection to the prosecutor's actual use of strikes at Petitioner's own trial in order to preserve any *Batson* claim.

Petitioner's trial occurred in October 1984. At that point, the Unified Appeal Procedure had been in effect

for approximately four years as the Unified Appeal Procedure (hereinafter UAP) is required to be followed in every case in which the death penalty is sought on an indictment returned after August 25, 1980. *Brown v. State*, 250 Ga. 66, 72, 295 S.E.2d 727 (1982). The UAP Outline of Proceedings and Checklist was first published in 1980 in the Appendix of Volume 246 of the *Georgia Reports*. (246 Ga. A-1). Petitioner's trial counsel was given a copy of the UAP at the first pretrial hearing on September 7, 1984. (9/7/84 M.T. 3; Copy of UAP appended at page 6). At the second pretrial hearing on September 17, 1984, Petitioner's trial counsel acknowledged he had received a copy of the UAP at the first hearing but noted he had also had a copy of the UAP "sometime prior to that" which counsel had reviewed prior to filing any motions in this case. (9/17/84 M.T. 18).

The UAP contains both an Outline of Proceedings and a Checklist which "are intended to assist [defense counsel] in protecting the defendant's rights, but it remains the responsibility of defense counsel to protect those rights . . . " *Brown v. State*, 250 Ga. at 72(3), *quoting* Outline of Proceedings Rule IA (3) of the UAP. The Checklist includes potential issues which could be raised at particular points during the pretrial or trial proceedings. Two purposes of the "Outline of Proceedings" are to "make certain that all matters which possibly could be raised on behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived" as well as "prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may

occur." (246 Ga. A-5). Purposes of the Checklist include alerting the court, defense counsel and the prosecutor to "general and specific categories of error" which should be avoided and noting that some of the errors "traditionally or necessarily occur at particular stages of the case," with the Checklist not raising "every error which may occur." (246 Ga. A-5, A-6). Under the Review Proceedings, IV A, 2(a), the UAP provides that the rules are not to be construed as to restrict or limit issues but that it is "the purpose of these rules to insure that as many issues as possible which heretofore could be raised by a writ of habeas corpus or other post-trial procedure were timely raised prior to or during trial." (246 Ga. A-13). The UAP copy actually provided to trial counsel in this case contains among the Checklist of potential issues *Swain v. Alabama* under the section regarding jury challenges to the array. (UAP, p. 8; appended at p. 6 of 9/7/84 M.T.).

In addition to the UAP procedure for capital cases, the Georgia habeas corpus statute was amended in 1982 to provide as follows:

> The [habeas corpus] court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

O.C.G.A. § 9-14-48(d); 1982 Ga. Laws p. 786. This amendment became effective on April 13, 1982, but is not

applicable to petitions filed before January 1, 1983. *Valenzuela v. Newsome*, 253 Ga. 793, 797, 325 S.E.2d 370 (1985).

Thus, the combination of the UAP and the 1982 amendment constituted Georgia's "complement of procedural rules" which sought to channel at Petitioner's 1984 trial "to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

Against this backdrop, Petitioner's trial counsel filed a pretrial motion in which he "anticipated" that the prosecutor would use his strikes in an allegedly discriminatory manner. Petitioner produced no evidence of this motion, resulting in its pretrial denial. What the Supreme Court of Georgia declined to excuse was Petitioner's failure to voice, after the prosecutor had in fact used his ten peremptory challenges, any dissatisfaction with the jury actually selected or the manner in which the prosecutor actually utilized those strikes at Petitioner's trial. Contrary to Petitioner's assertions, assumptions and sheer speculation, the record here contains no evidence and no factual findings that Petitioner ever objected during the trial to the manner of selection, nor to the composition, of his trial jury.

On remand, the Georgia Supreme Court correctly interpreted *Batson* as requiring that an objection to the prosecutor's use of strikes "be made *before* the trial of the case begins." *Ford*, 257 Ga. at 661 (JA 51). (Emphasis in original). The state appellate court found further support for this position in *Griffith* itself where, as previously

noted, the defendant in *Griffith* had moved to discharge the jury panel following the prosecutor's use of strikes. The Georgia Supreme Court found that while Petitioner had filed a pretrial motion challenging the prosecutor's anticipated use of strikes, Petitioner at the pretrial hearing failed to offer any proof showing systematic exclusion. *Ford*, 257 Ga. at 661-662 (JA 53). The Georgia Supreme Court further found that after the jury had been selected and sworn, defense counsel was given an opportunity by the trial court to make an objection to the jury selection process, but defense counsel declined to make any objection. *Id.* The State submits these factual findings are correct and amply supported by the record.

The Georgia Supreme Court then noted that while Petitioner could claim under *Griffith* that *Batson* applied to his case, *Griffith* itself had not expressly held that a defendant who fails to make an objection at trial to the actual use of strikes by the prosecutor would nonetheless be entitled to relief. *Ford*, 257 Ga. at 662. (JA 53). The court then noted that it had already determined in a previous case that point in time when a *Batson* challenge should be raised, with that decision being *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987). The Georgia Supreme Court then found as fact:

> Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

Ford, 257 Ga. at 663 (JA 54). The court then noted that "even if colloquy in the trial judge's chambers on the

second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State* [257 Ga. 91, 94(3), 355 S.E.2d 66 (1987)]." *Id.* The court concluded that Petitioner's *Batson* claim was not timely "where Ford made no objection to the composition of the jury after it was selected and before the trial commenced." *Ford*, 257 Ga. at 664 (JA 55).

The State submits that the Georgia Supreme Court correctly determined that *Griffith* did not hold that all pretrial *Swain* claims which were not renewed at trial are nonetheless entitled to be treated as *Batson* claims. *Ford*, 257 Ga. at 662 (JA 53). Rather, as noted above, *Griffith* and *Brown* both involved contemporaneous objections to the prosecutor's use of peremptory strikes after those strikes were utilized. Thus, the State submits that the interpretation which the Georgia Supreme Court gave *Griffith* – i.e., "all that *Griffith* dictates is that objections made – at trial – must be resolved under the *Batson* rule," was not inconsistent with the remand in this case. *Ford*, 257 Ga. at 662 (JA 53). This Court itself noted in *Batson* that the Court would not promulgate rules of state or federal procedure in order to resolve *Batson* claims. For these reasons, the State submits that the Georgia Supreme Court did not fail to comply with the remand order in this case.

II. THE GEORGIA PROCEDURAL BAR AS APPLIED IN THIS CASE IS AN INDEPENDENT AND ADEQUATE STATE GROUND.

In the second issue presented to this Court for review, Petitioner contends that the Georgia Supreme Court's reliance upon a specific state procedural rule

delineating when a *Batson* claim is timely fails to constitute an independent and adequate state ground. The State submits that the decision of the Georgia Supreme Court rested upon the fact that Petitioner had failed to object at trial to the prosecutor's use of strikes and, in concluding that the *Batson* claim was not preserved for review, the court simply relied upon two cases in which it had already determined and articulated the method of preservation and the issue of timeliness. The State further submits that a review of the decisions of the Georgia Supreme Court dealing with *Batson* will show that the procedural bar in this case constitutes an independent and adequate state ground.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court noted that it had relied upon various principles in determining whether a state procedural bar constituted an independent and adequate state ground and that the Court had "thus far not developed a satisfying consistent approach for resolving this vexing issue." Under *Henry v. Mississippi*, 379 U.S. 443 (1965), this Court has examined whether a state procedural rule served "a legitimate state interest." Most recently, in *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981 (1988), this Court examined whether a procedural rule was "strictly or regularly followed" to determine whether it was adequate, *citing Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). The State submits that under either approach, the rule relied upon by the Georgia Supreme Court in this case is constitutionally adequate.

The State submits that a review of Georgia law shows that the state appellate court was not merely relying upon a rule which was announced after Petitioner's trial in

order to avoid deciding a federal question. Rather, the court had already decided the issue presented in the instant case – i.e., whether the lack of a trial objection to the prosecutor's actual use of strikes preserves a *Batson* claim, and instead of readjudicating the issue anew, simply relied instead upon the two cases in which these same issued had already been decided.

Petitioner's case was the eighth case in which the Supreme Court of Georgia dealt with the applicability, if any, of *Batson*. The first appearance of *Batson* was in the context of a successive state habeas corpus petition filed by a death-sentenced petitioner, and the Georgia Supreme Court declined to apply *Batson* retroactively, especially where no *Swain* challenge had been previously raised. *Bowden v. Kemp*, 256 Ga. 70, 344 S.E.2d 233 (1986). In the second appearance of *Batson*, the state appellate court concluded that a white defendant had no standing to raise a *Batson* challenge. *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986).

In the third appearance of *Batson*, the state appellate court granted certiorari and affirmed the decision of the Court of Appeals of Georgia holding *Batson* applied under *Griffith*. *State v. Mincey*, 256 Ga. 636, 353 S.E.2d 814 (1987). However, that decision is not inconsistent with the decision in this case as, "At the conclusion of the jury selection process, defense counsel moved for a continuance on the basis that the District Attorney's systematic striking of all blacks on the forty-two-member panel denied the defendant the right to a jury of his peers." *Mincey v. State*, 180 Ga. App. 263, 264, 349 S.E.2d 1 (1986). Here, Petitioner made no objection at trial, thus giving no

indication of any dissatisfaction with the prosecutor's actual use of strikes.

In the fourth appearance of *Batson*, a defendant did not raise a motion for mistrial based on the prosecutor's use of strikes until the second morning of trial; on the day before, defense counsel stated he had no motions or matters to bring up after the jury was selected and sworn, opening statements were given, five witnesses were called to testify and then the trial was recessed for the day. *Riley v. State*, 257 Ga. 91, 94, 355 S.E.2d 66 (1987). In *Riley*, the state appellate court found the challenge was not timely raised so that the *Batson* issue was not preserved for review.

State v. Sparks is the fifth case in which the state appellate court considered the applicability of *Batson*. In *Sparks*, the Georgia Supreme Court granted certiorari to the Georgia Court of Appeals to determine whether a *Batson* challenge had been timely raised. In *Sparks*, the record shows that after voir dire, the jury was selected, sworn, given preliminary instructions and then excused for lunch. *Sparks*, 257 Ga. at 98. After lunch recess and a hearing on an unrelated motion, the defense then made a motion for mistrial based upon the prosecutor's use of strikes to exclude black veniremen. *Id*. The Georgia Supreme Court remanded *Sparks* for a *Batson* hearing, concluding that the motion was made relatively promptly, particularly when no decision up until that time had required that a *Batson* challenge be raised prior to the jury being sworn. The court held specifically in *Sparks* that "hereafter any claim under *Batson* should be raised *prior to the time the jurors selected to try the case are sworn.*" *Sparks*, 257 Ga. at 98. (Emphasis added).

In the sixth appearance of *Batson*, a death penalty case tried in May 1985, the *Batson* claim was not raised until after trial. The court concluded the issue was not timely raised and not preserved for review. *Childs v. State*, 257 Ga. 243, 257(21), 357 S.E.2d 48 (1987).

In the seventh appearance of *Batson*, the state appellate court found that *Batson* had been decided twelve days prior to the beginning of voir dire in that case and that the prosecutor's proffered reasons in rebuttal after a *Batson* challenge were not sufficiently race-neutral. *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987). The murder conviction and death sentence were reversed.

Petitioner's case was the next case decided by the state appellate court addressing *Batson*. As previously noted, the court found as a predicate matter that Petitioner voiced no objection, contemporaneous or otherwise, to the prosecutor's actual use of strikes. *Ford*, 257 Ga. at 663. (JA 54). Then, even alternatively construing the recorded colloquy in chambers on the second day of trial regarding the racial composition as a motion by Petitioner, the court deemed the issue untimely. *Id*.

There can be no question of the legitimacy of the rule announced by the Georgia Supreme Court in *Sparks* – i.e., that a *Batson* objection must be raised prior to the time the jury is sworn. *Sparks*, 257 Ga. at 98. This is consistent with other Georgia law regarding jury selection, such as requiring that challenges to the grand jury array be filed prior to indictment or challenges to the traverse jury array shall be filed at trial when the array is "put upon him." O.C.G.A. § 15-12-162; *Alderman v. State*, 254 Ga. 206,

327 S.E.2d 168 (1985). As previously noted, "any objections to a juror for cause shall be made before the juror is sworn in the case." O.C.G.A. § 15-12-167. Requiring that a challenge be made before the jury is sworn also avoids questions of whether double jeopardy has attached. Thus, the rule announced in *Sparks* is not a radical, unforeseeable departure from other Georgia rules regarding jury challenges. Quite the contrary, it naturally follows.

The State submits that unlike *Barr v. City of Columbia*, the other cases decided by the Georgia Supreme Court prior to Petitioner's case are consistent with the decision reached by the Georgia Supreme Court in Petitioner's case. Petitioner does not question the legitimacy of a rule requiring that a *Batson* claim be raised before the jury is sworn so that the trial court at that point may take remedial action. *Cf. Henry v. Mississippi*. Rather, Petitioner complains of the application of that rule in his case. The State submits, however, that it was not unreasonable for the Georgia Supreme Court to conclude that Petitioner should not receive the benefits of *Batson* where he voiced no objection to the prosecutor's actual use of peremptory strikes at Petitioner's trial. Petitioner never stated that his pretrial anticipation had become a reality. The State submits that under these facts, the decision of the Georgia Supreme Court applying a procedural bar constitutes both an independent and an adequate state ground.

Both the Georgia Unified Appeal Procedure and the 1982 habeas corpus amendment gave sufficient notice to defense counsel in a 1984 Georgia death penalty trial of the need to raise timely objections. The fact that *Batson* had not yet been decided and the fact that the Georgia Supreme Court had not had the opportunity to delineate

specifically for defense counsel how to preserve a *Batson* claim should not excuse Petitioner's failure to have objected to the prosecutor's use of strikes at Petitioner's own trial. The State submits that such an objection is inherent in a *Batson* claim as *Batson* rests upon the prosecutor's actual use of strikes. Petitioner's total lack of objection is the basis upon which the Georgia Supreme Court applied the procedural bar, not Petitioner's lack of a timely objection.

Unlike *Swain* which required a showing of a pattern of systematic exclusion on the part of the prosecutor and where one case was generally viewed as insufficient to establish a violation, the *Batson* claim does not occur until the prosecutor has used his or her strikes in the individual defendant's trial. The State submits that inherent in a *Batson* challenge is a relatively timely assertion that the defendant is dissatisfied with the manner in which the prosecutor used those strikes. The Georgia Supreme Court here did not rely upon the defendant's failure to recite any talismanic words or phrases to conclude Petitioner was barred from proceeding on his *Batson* claim. Rather, even a simple oral motion for mistrial in the *Sparks* case was sufficient to preserve a *Batson* claim. *Sparks*, 257 Ga. at 98.

It is important to note that Petitioner did not cite *Swain* in his pretrial motion seeking to restrict the prosecutor's use of peremptory strikes. (Record 49-50; JA 4). Instead, Petitioner relied upon *McCray v. New York*, 461 U.S. 961 (1983) and *Taylor v. Louisiana*, 419 U.S. 522 (1975), Sixth Amendment fair cross-section cases. *Id.*

Justice Marshall in his dissent in *McCray* observed, "The desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn by the issues." *McCray*, 461 U.S. at 968. Justice Marshall also discussed how, "In California, for example, a defendant must make a timely objection and show from all the circumstances a strong likelihood that the prosecution is exercising its peremptory challenges because of race alone." *McCray*, 461 U.S. at 969. The California procedure empowered the trial court to require the prosecutor to show "some non-racial basis for the exercise of its challenges" and the trial court thereafter determined "whether the defendant has successfully demonstrated that the prosecution is using its peremptory challenges in a constitutionally impermissible manner." *Id.*

The crux of the issue in this case is whether it was reasonable for the Georgia Supreme Court to have required Petitioner to have made an objection to the jury selected in his case after the prosecutor had utilized his ten peremptory challenges, particularly where *Batson* had not yet been announced. The pertinent point is that Petitioner never objected to the manner in which the prosecutor actually utilized his strikes. Rather, Petitioner had simply filed a pretrial "anticipatory" motion but, as previously noted, never voiced any dissatisfaction with the jury actually selected in this case or with the prosecutor's actual use of his strikes. Petitioner's silence should be deemed acquiescence or satisfaction with the jury selected in this case. But for the actions of the trial court, the racial composition of this jury would not have even been placed in the record. Further, new counsel entered

the case at the motion for new trial level, and it was new counsel, not trial counsel, who specifically reasserted the pretrial motion regarding the prosecutor's use of challenges. Under these facts, where Petitioner voiced no dissatisfaction at trial through some sort of objection, motion or other form, the Georgia Supreme Court properly concluded that Petitioner had not preserved a challenge to the manner in which the prosecutor used this peremptory strikes at Petitioner's trial. Thus, the Georgia Supreme Court's refusal to consider the merits of the *Batson* claim was based upon an independent and adequate state ground.

CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of Petitioner should be affirmed and this Court should affirm the decision of the Supreme Court of Georgia.

Respectfully submitted,

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